

No.11889

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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C. T. POTTER, et al.,

Appellants,

vs.

KAISER COMPANY, INC., a corporation, and  
UNITED STATES OF AMERICA,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

FILED

MAY 21 1946

PAUL R. O'BRIEN,

CLERK



No. 11889

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Circuit Court of Appeals  
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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Answer to Amended Complaint.....	15
Amended Complaint.....	4
Exhibit A—List of Employees.....	8
Appeal:	
Appellee's Designation of Additional Por- tions of Record on.....	48
Bond for Costs on.....	45
Certificate of Clerk to Transcript of Rec- ord on .....	54
Notice of.....	44
Plaintiffs-Appellants' Designation of Rec- ord on.....	47
Statement of Points (DC) Upon Which Plaintiffs-Appellant Intend to Rely on..	46
Statement of Points (CCA) Upon Which Plaintiffs-Appellant Intend to Rely on..	95
Appellee's Designation of Additional Portions of Record on Appeal.....	48
Bond for Costs on Appeal.....	45
Certificate of Clerk to Transcript of Record on Appeal .....	54
Docket Entries.....	50
Findings of Fact and Conclusions of Law.....	38
Conclusions of Law.....	41
Findings of Fact.....	39

Judgment Dismissing Action for Want of Jurisdiction .....	43
Memorandum of Decision.....	37
Motion of the United States to Intervene and for Time Within Which to File Brief in Sup- port of the Constitutionality of the Portal-to- Portal Act of 1947.....	33
Names and Addresses of Attorneys of Record...	1
Notice of Appeal.....	44
Order .....	34
Plaintiffs-Appellants' Designation of Record on Appeal.....	47
Pleading of the United States in Intervention.	36
Reply .....	28
Statement of Points Upon Which Plaintiffs- Appellant Intend to Rely on Appeal.....	46, 95
Summons in a Civil Action.....	2
Transcript of Proceedings.....	56
Defendant's Motion for Dismissal.....	92
Exhibit for Plaintiff:	
No. 31—Instructions to Guards, etc.....	70
Witness for Plaintiff:	
Potter, Collyer T.	
—direct .....	56
—cross .....	76
—redirect .....	88
—recross .....	89

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

GREEN AND LANDYE,

Corbett Building,

Portland, Ore.,

For Appellant.

TOM C. CLARK,

Attorney General,

PEYTON FORD,

Assistant Attorney General,

Washington, D. C.;

HENRY L. HESS,

United States Attorney,

Portland, Ore.,

For Intervenor.

THELEN, MARRIN, JOHNSON & BRIDGES,

RICHARD DEVERS and

GORDON JOHNSON,

111 Sutter Street, San Francisco, and

HART, SPENCER, McCULLOCH &

ROCKWOOD,

Yeon Building,

Portland, Oregon,

For Appellee.

District Court of the United States for the  
District of Oregon

Civil Action File No. 3030

C. T. POTTER,

Plaintiff,

vs.

KAISER COMPANY, INC., a Corporation,

Defendant.

### SUMMONS IN A CIVIL ACTION

To the above-named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Green & Landye, plaintiff's attorneys, whose address is 1003 Corbett Building, Portland 4, Oregon, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

LOWELL MUNDORFF,

Clerk of Court.

By /s/ F. L. BUCK,

Chief Deputy Clerk.

Date: Jan. 17, 1946.

[Endorsed]: Filed January 24, 1946. [1\*]



## Return on Service of Writ

I hereby certify and return, that on the 17th day of Jan., 1946, I received the within summons and that I served the same on the 23d of Jan., 1946, at Portland, in the State and District of Oregon, by delivering a copy thereof together with a copy of the Complaint in the within entitled cause to the therein named Kaiser Co., Inc., a corporation, by serving George E. Clinton, Office Mgr. and Statutory Agt., at the office of the company at Swan Island at 4 p.m. personally.

JACK R. CAUFIELD,  
United States Marshal.

By /s/ ALBERT A. PRICE,  
Deputy United States  
Marshal.

## Marshal's Fees

Travel .....	\$ .20
Service .....	2.00
Total .....	<hr/> \$2.20

[Title of District Court and Cause.]

### AMENDED COMPLAINT

Comes now the plaintiff, and based upon stipulation and order of court files this his amended complaint, and for cause of action against the above-named defendant complains and alleges:

#### I.

That this action is brought to recover from defendant unpaid overtime compensation and an additional amount equal to the amount of such unpaid overtime compensation as liquidated damages, pursuant to the Fair Labor Standards Act of 1938 (29 U.S.C.A., sections 201-219, inclusive, hereinafter referred to as the Act.

#### II.

That jurisdiction is conferred on this court by section 48 (8), 28 U.S.C.A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," and by section 16 (b) of the Act.

#### III.

That at all times hereinafter mentioned defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the state of Nevada, with a principal office and place of business in the city of Portland, Oregon, and engaged in interstate commerce and in the production of goods for interstate commerce, within the meaning of said Act, in that the [2] defendant was and now is engaged in the operation of a shipyard at

Swan Island, in the city of Portland, state of Oregon, known as the Kaiser Company, Inc., Swan Island Yard, at which defendant was and now is engaged in the construction of ships, all of which have been produced from materials 90% of which were shipped to the defendant's said yard from points outside the state of Oregon and 100% of said ships have been produced for interstate commerce and have been sold and delivered and offered for sale and delivery in interstate commerce by defendant from said defendant's shipyard at Swan Island, Portland, Oregon, to various points outside the state of Oregon, and that in addition, by reason of the fact that at said yard defendant was and now is engaged in the repair of ships, 100% of which are regularly engaged in interstate commerce and have come to said yard for repairs from points outside the state of Oregon and are now en route after said repairs to points outside the state of Oregon; that 100% of the materials used in said repairs are shipped to defendant's yard from points outside the state of Oregon.

#### IV.

That at all times hereinafter mentioned, and particularly between February 1, 1942, and May 1, 1946, defendant employed guards at said Swan Island Yard, whose occupations were at all times herein mentioned, and now are, an integral and indispensable part of said operation and necessary to the production of said ships for interstate com-

merce, and the repair of ships engaged in interstate commerce, as hereinbefore stated, for the reason that, among other things, the said guards protected the yard from fire, sabotage and lawlessness that otherwise might have prevented, interfered with or impeded the production and repair thereof.

## V.

That at all times hereinafter mentioned plaintiff and those similarly situated whose names are set out in Exhibit A, attached hereto and by reference made a part hereof, were employed by said defendant as guards; that plaintiff and the individuals whose names appear in Exhibit A had duties which included, [3] among other things, protection of said yard from fire, sabotage and lawlessness, and the performance of said duties by plaintiff and other employees similarly situated was an occupation necessary to the production of said ships for interstate commerce, as aforesaid, and was also an integral and indispensable and necessary part of the repair of ships engaged in interstate commerce, as aforesaid.

## VI.

That between said dates aforementioned plaintiff and those similarly situated, set out in Exhibit A, were compelled and required to work the hours of overtime set opposite their names in said Exhibit A in the second column, for which they were not compensated; that by reason of the defendant requiring the plaintiff and other employees similarly situated

to work in excess of said forty hours per week without the payment of overtime for which they received no compensation, plaintiff and other employees similarly situated are entitled to the sum of money set opposite their names in said Exhibit A in the last column, together with an additional equal sum as liquidated damages, as provided for in the Fair Labor Standards Act.

#### VII.

That by virtue of the provisions of section 16 (b) of said Act, plaintiff has employed attorneys, and is entitled to be awarded a reasonable attorneys' fee of \$100,000.00 herein.

#### VIII.

That prior to the commencement of this action, those employees who were similarly situated with plaintiff, and whose names appear in said Exhibit A, have designated the plaintiff as their agent and representative to maintain this action for and on their behalf.

Wherefore, plaintiff demands judgment against the above named defendant for the full sum of One Hundred Sixty-eight Thousand Five Hundred Four and 08/100 (\$168,504.08) Dollars and the further sum of One Hundred Thousand (\$100,000.00) Dollars, attorneys' fees, and for his costs and disbursements incurred herein.

GREEN & LANDYE,

Attorneys for Plaintiff. [4]

## EXHIBIT A

Overtime rate per hour \$1.57½

Name	Hours of Overtime	Total
Potter, C. T. ....	250	\$ 393.18
Abbott, Charles ....	806	1,268.84
Adams, V. L. ....	673	1,061.26
Allwen, Philip ....	174	274.26
Allen, S. M. ....	639	1,007.14
Anderson, A. C. ....	201	316.34
Anderson, Carl E. ....	167	259.32
Anderson, Helen S. ....	82	129.26
Anderson, John A. ....	268	422.66
Anderson, O. I. ....	940	1,481.32
Arata, H. A. ....	869	1,365.98
Aspland, Hubert G. ....	547	860.90
Bailey, G. D. ....	727	1,145.96
Baldwin, J. W. ....	327	514.68
Balfour, A. H. ....	880	1,386.76
Bane, Del W. ....	155	244.42
Bartels, Edward ....	320	501.80
Bassett, H. L. ....	8	12.02
Berberick, Al O. ....	130	205.30
Berg, Fred J. ....	29	45.38
Bergholt, C. T. ....	207	326.68
Betts, H. L., Sr. ....	537	845.42
Billingsley, Hoil ....	275	433.58
Boylan, H. W. ....	121	190.86
Briedwell, Paul R. ....	179	281.54
Broderson, August ....	604	950.98
Broderson, J. A. ....	541	852.78
Brown, C. D. ....	200	315.12
Brown, Geo. D. ....	151	237.44
Brown, H. T. ....	622	979.98
Bueholts, W. M. ....	620	978.96
Buckner, Melvin E. ....	531	835.96
Buhite, J. S. ....	975	1,535.30
Burnett, W. W. ....	676	1,064.12
Burnette, Ralph ....	66	104.14

Name	Hours of Overtime		Total
Burns, Frank J. ....	227	\$	347.58
Burns, W. R. ....	589		928.42
Butterfield, A. E. ....	270		425.58
Carey, S. A. ....	291		458.80
Carlson, C. E. ....	275		433.58
Carmody, J. F. ....	90		142.20
Casey, Robert S. ....	229		360.12
Caswell, L. L. ....	37		58.46
Charles, E. F. ....	978		1,541.12
Christensen, L. A. ....	684		1,077.88
Clifton, Harold G. ....	86		135.24
Collins, Fred ....	113		178.20
Conn, C. M. ....	250		396.02
Conover, H. C. ....	387		610.32
Conway, Tom J. ....	347		546.44
Cozad, Chas. H. ....	963		1,516.18
Cranford, Louis J. ....	182		287.02
Crum, Wm. A. ....	105		164.80
Curveon, James L. ....	635		1,000.32
Daley, John J. ....	207		325.48
Davenport, W. E. ....	907		1,428.90
Davis, Floyd E. ....	767		1,207.78
Deady, M. E. ....	118		285.32
Desoer, J. ....	161		253.92
Deters, J. A. ....	291		457.84
Dockham, R. C. ....	139		219.06
Dow, D. H. ....	447		703.82
Eagen, Raymond George ....	256		403.54
Ebeling, Jessie M. ....	511		804.72
Ehrmantrout, F. R. ....	423		655.74
Elliott, J. W. ....	594		935.32
Elliott, S. L. ....	445		700.70
Engelsgaard, Sarah E. ....	670		1,054.92
English, Robert O. ....	131		306.74
Falin, James T. ....	476		750.12
Farnsworth, Chas. R. ....	449		707.62
Farrell, J. R. ....	635		999.66
Fetters, H. C. ....	542		853.96
Filbin, Walter J. ....	198		311.72



Name	Hours of Overtime	Total
Fine, R. Norton .....	533	\$ 837.68
Fithian, Harold W. ....	375	590.86
Fletcher, D. B. ....	895	1,410.26
Fletcher, Jack .....	718	1,130.56
Follis, R. D. ....	819	1,289.88
Forsythe, John .....	119	187.80
Fortson, Native Roger .....	79	125.10
Foss, H. A. ....	533	838.90
Francis, W. D. ....	94	148.66
Frost, Stanley D. ....	217	341.46
Gadd, J. R. ....	499	785.88
Gaertner, G. H. ....	55	86.66
Gardner, R. L. ....	344	541.52
Gates, M. J. ....	22	33.90
Geesa, G. X. ....	565	890.34
Getz, Louis J. ....	275	433.82
Gibson, George W. ....	113	178.38
Gibson, Robert .....	390	613.86
Gilchrist, Wm. H. ....	765	1,204.98
Glenn, O. V. ....	804	1,266.34
Gorman, John F. ....	596	937.92
Grover, T. D. ....	116	182.36
Gump, Edward J. ....	289	455.94
Hahn, Ralph F. ....	356	560.98
Hall, Charles .....	659	1,037.76
Hanson, Andrew .....	620	977.10
Harr, Charles .....	369	581.68
Hatley, Guy .....	576	907.02
Heath, John L. ....	124	194.84
Henry, Wayne K. ....	556	875.34
Herauf, Peter J. ....	654	1,029.78
Hogan, D. B. ....	448	705.50
Hodges, Claude L. ....	1011	1,592.90
Holliday, Earl G. ....	600	944.44
Hopp, Lawrence E. ....	59	92.26
Hopp, Lester R. ....	19	29.48
Hovey, LeRoy B. ....	333	525.24
Hudson, M. ....	56	88.74
Hughet, Leo C. ....	146	230.40



Name	Hours of Overtime	Total
Inberg, C. C. ....	203	\$ 319.54
Jackson, C. H. ....	181	284.54
Jackson, Robert A. ....	225	354.80
Jasmann, J. K. ....	953	1,500.42
Jenkins, A. ....	596	938.08
Jensen, L. P. ....	82	129.34
Johnson, A. E. ....	418	658.18
Johnson, E. E. ....	436	786.14
Johnson, A. F. ....	151	237.66
Johnson, Roy ....	283	444.94
Johason, Kathryn M. ....	105	166.04
Judd, G. L. ....	531	835.88
Judd, S. T. ....	613	965.50
Kaliviet, Adaline M. ....	128	201.44
Kennedy, Tom ....	275	432.84
King, Thomas F. ....	100	157.66
Klavcano, G. W. ....	258	406.58
Klem, T. E. ....	206	324.06
Kleimenhagen, J. G. ....	685	1,079.24
Klema, Paul T. ....	56	87.74
Kluge, E. A. ....	755	1,188.80
Kolmer, R. C. ....	949	1,494.74
Krause, Geo. M. ....	409	644.32
Krouse, Clyde A. ....	469	738.32
Labrum, Theron L. ....	220	346.88
Landis, Fred ....	590	928.66
Larrance, Fred H. ....	598	941.88
Larson, Frank ....	513	492.24
Larson, Harry E. ....	474	746.68
Langa, Frank B. ....	420	661.36
Lawrence, H. S. ....	578	910.72
Lawson, Albert C. ....	255	401.62
Laymon, LeRoy E. ....	181	285.54
Laymon, Roy ....	423	665.52
Leak, W. J. ....	613	964.98
Lennox, J. ....	551	867.68
Lillie, J. W. ....	307	483.60
Long, W. P. ....	29	45.60
Lovell, Charles E. ....	759	1,196.16

Name	Hours of Overtime	Total
Luebben, Harry D. ....	169	\$ 266.44
Mackey, E. L. ....	616	970.22
Markell, David H. Jr.....	793	1,248.28
Mead, J. G. ....	504	793.96
Megale, D. V. ....	126	197.82
McClaire, Eldred M. ....	351	553.20
McGuire, Jessie J. ....	603	949.44
McMillen, F. M. ....	458	721.02
McKenna, J. F. ....	515	810.50
Mencer, Elmer F. ....	156	246.80
Mercer, Guy ....	397	625.08
Merrick, Mary R. ....	594	934.92
Messick, M. E. ....	6	9.02
Meyers, Charles J. ....	462	727.76
Monroe, James R. ....	664	1,046.38
Monteith, John Edmund ....	447	703.60
Morgan, John ....	847	1,333.72
Morton, Roberta D. ....	556	876.26
Mullan, Jack ....	694	1,092.66
Murrow, Roy H. ....	477	594.58
Moritz, Elmer ....	347	546.00
Nelson, Carl S. ....	764	1,203.52
Nelson, Christie ....	470	739.64
Nelson, J. K. ....	564	898.08
Nelson, Oscar ....	521	820.88
Newkirk, Fred ....	266	418.26
Newton, Thomas B. ....	56	87.96
Nihart, Harry D. ....	303	476.44
Norman, F. H. ....	532	837.90
Norton, Luther L. ....	191	300.52
Olson, L. V. ....	885	1,394.36
O'Rourke, J. F. ....	101	159.06
Orris, G. G. ....	241	380.16
Osmond, F. B. ....	204	320.60
Peterson, Roy H. ....	670	1,055.86
Phillips, Charles C. ....	236	371.96
Pickett, J. F. ....	100	156.94
Placzek, Ambrose J. ....	258	405.70
Poindexter, C. M. ....	297	468.24

Name	Hours of Overtime	Total
Potts, O. J. ....	530	\$ 834.72
Price, Howard N. ....	84	131.88
Priebe, Wm. ....	828	1,303.62
Pugh, C. B. ....	673	1,060.38
Quimby, Dorothy M. ....	274	463.14
Rama, E. E. ....	306	482.98
Rankin, Mary M. ....	460	724.64
Ransom, D. E. ....	358	565.80
Reed, Eugene ....	22	35.64
Reiter, Leonard ....	506	797.34
Riley, R. F. ....	875	1,379.42
Roberts, P. G. ....	587	925.42
Rocks, J. E. ....	85	134.08
Rushton, D. D. ....	405	638.54
Schlatter, Ralph B. ....	60	94.62
Schlottman, A. C. ....	162	255.36
Schmidt, H. O. ....	579	912.52
Schmitz, J. N. ....	554	873.68
Seeley, H. A. ....	513	808.84
Shafer, Byron A. ....	106	166.62
Shafer, R. W. ....	370	582.40
Shilling, F. A. ....	351	553.64
Siewert, L. C. ....	257	406.08
Sinnott, T. O. ....	496	781.16
Simmons, Thos. G. ....	177	278.96
Snyder, Herbert F. ....	433	682.64
Stanley, A. K. ....	635	1,080.26
Stevenot, Charles A. ....	109	271.92
Stevens, Arthur A. ....	739	1,163.68
Stevenson, F. M. ....	908	1,430.36
Stewart, Raymond E. ....	468	737.86
Stokes, D. D. ....	928	1,460.98
Stone, P. B. ....	580	913.50
Stroud, T. J. ....	509	802.48
Swadberg, T. H. ....	836	1,316.86
Taylor, L. R. ....	516	813.14
Thompson, Albert W. ....	592	933.50
Thompson, L. K. ....	444	699.94
Thornton, Larry J. ....	505	795.66

Name	Hours of Overtime		Total
Toolan, George J. ....	251	\$	395.18
Trowbridge, Frank H. ....	456		717.56
Tracy, F. P. ....	140		221.12
Truman, Austin E. ....	186		295.72
Tschida, E. J. ....	428		675.34
Turner, G. W. ....	329		518.90
Tuttle, Harry F. ....	163		257.24
Underwood, W. J. ....	390		615.08
Unger, Carl D. ....	178		281.20
Van Meter, M. J. ....	89		139.68
Voss, Gilbert J. ....	644		1,014.94
Wall, Olin P. ....	329		519.38
Wallig, B. J. ....	251		395.34
Warren, M. D. ....	754		1,187.80
Waters, Franz E. ....	372		586.36
Weber, John ....	170		268.48
Wells, Cecil P. ....	245		387.16
White, Geo. O. ....	271		426.74
Wiederspan, John H. ....	178		280.40
Williams, Earl C. ....	287		452.94
Williams, W. L. ....	60		93.82
Wilson, J. E. ....	529		848.98
Wilson, J. W. ....	878		1,383.96
Wise, J. M. ....	821		1,294.30
Woolf, Lowel H. ....	559		881.56
Wray, Jean Davis ....	55		87.78
Yeo, Harold A. ....	456		718.44
Zako, Mike ....	483		760.30
Zerbe, G. M. ....	554		873.22
Zettle, Emmerich ....	558		880.34
Ziese, Herbert H. ....	634		999.58
Total.....			<hr/> \$168,504.08

State of Oregon,  
County of Multnomah—ss.

Due service of the within Amended Complaint is hereby accepted in Multnomah County, Oregon, this 1st day of April, 1947, by receiving a copy thereof, duly certified as such by Donald S. Richardson of attorneys for Plaintiff.

RICHARD DEVERS,

Of Attorneys for Defendant.

[Endorsed]: Filed April 3, 1947. [9]

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[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED  
COMPLAINT

Defendant, Kaiser Company, Inc., based upon stipulation and order of Court, files its amended answer to plaintiff's amended complaint herein and admits, denies and alleges as follows:

I.

Answering paragraph II thereof, denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

II.

Answering paragraph III, defendant admits the following: it is, and at all times mentioned in said amended complaint was, a corporation organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and oper-

ation of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and all vessels constructed at said shipyard were tankers constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said amended complaint, to wit, May 1, 1946, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion furnished by the Government and of that

portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with other Governmental purposes and uses; but the funds for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how," and production methods for the conduct of said shipyard; but the construction, maintenance and operation of said shipyard by defendant was at all times under the direction, supervision and control of the United States of America, acting by and through the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

### III.

Answering paragraph IV, defendant admits the following: in the period of time referred to in said paragraph, and in connection with the construction,



maintenance and operation of said shipyard as hereinabove in paragraph II expressly alleged, defendant engaged various persons as guards at said shipyard for the purpose of protecting property of the United States Government, the engagement of said persons by defendant being at all times subject to the direction, supervision and control of said Government, acting by and through the United States Maritime Commission, and said engagement by defendant being for the use and benefit of the United States Government. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

#### IV.

Answering paragraph V, defendant admits the following: At various times during the operation of said shipyard, as stated in paragraph II hereof, in the period of time referred to in the amended complaint, plaintiff and the other persons named in Exhibit A to said amended complaint were engaged as guards at said shipyard, as alleged in paragraph III hereof. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph. [12]

#### V.

Answering paragraph VI, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.



## VI.

Answering paragraph VII, defendant admits that plaintiff has employed Messrs. Green & Landye as his attorneys in connection with the above-entitled action; otherwise, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

## VII.

Answering paragraph VIII, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

As and for a first, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

## I.

The rights of action set forth in the complaint are for trifling periods of time and sums due and are within the doctrine expressed in the legal maxim "de minimis non curat lex."

As and for a second, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

## I.

Defendant is, and at all times mentioned in said amended complaint was, a corporation organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and op-

eration of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained [13] an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies, and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and all vessels constructed at said shipyard were tankers constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said amended complaint, to wit, May 1, 1946, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion

furnished by the Government and of that portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with other Governmental purposes and uses; but the funds [14] for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how" and production methods for the conduct of said shipyard.

## II.

By reason of the foregoing, the United States is the real party in interest and the true defendant in the above-entitled action and, by reason of not having consented to be sued in an action of the character and involving the amount set forth in the amended complaint herein, enjoys sovereign immunity from suit on the causes of action referred to in said amended complaint.

As and for a third, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

By reason of the foregoing the United States of America is in fact and in law the employer of plaintiff and the other persons named on Exhibit A of the amended complaint insofar as the activities referred to in said amended complaint are concerned; and inasmuch as the United States of America is excluded from the term "employer" as used in the Fair Labor Standards Act of 1938, plaintiff and said other persons are not entitled to the benefits of said Act and said Act is not applicable to them in connection with the matters referred to in the amended complaint. [15]

As and for a fourth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

The foregoing activities of defendant were carried under cost-plus-a-fixed fee management con-

tracts or price-minus contracts with the United States Maritime Commission, all of which contracts were management contracts under which the principal function of defendant was to furnish managerial "know-how" for the construction, maintenance and operation of a shipyard belonging to the United States of America and under which the defendant was at all times subject to the direction, supervision and control of the United States of America in carrying on its sovereign function of prosecuting a war and procuring the necessary equipment, supplies and material necessary for such war prosecution.

### III.

Such activities of the United States Government, and of defendant on its behalf and subject to its direction, supervision and control, do not constitute commerce within the meaning of the Fair Labor Standards Act of 1938.

As and for a fifth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

#### I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense and paragraph II of its fourth affirmative defense. [16]

#### II.

The activities of defendant, as aforesaid, were as an instrumentality of the United States of America

and by reason thereof, as such instrumentality, defendant enjoys, in connection with the matters referred to in the amended complaint herein, sovereign immunity from suit on such matters.

As and for a sixth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

The claims and causes of action referred to in the amended complaint herein arose prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947.

II.

The activities of plaintiff and the other persons named in Exhibit A of the amended complaint were and are not activities which were compensable by either:

- (a) An express provision of a written or non-written contract of employment in effect, at the time of such activities, between plaintiff and said other persons (or their agent or collective bargaining representative) and defendant; or
- (b) A custom or practice in effect, at the time of such activities, at the establishment and place of employment of plaintiff and said other persons, to wit, at Swan Island shipyard, covering such activities.



III.

By reason of the foregoing, under Section 2(a) of the Portal-to-Portal Act of 1947, defendant is not subject to any liability under the Fair Labor Standards Act of 1938, as amended, in connection with the matters referred to in the amended complaint herein.

As and for a seventh, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges: [17]

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraphs I and II of its sixth affirmative defense.

II.

By reason of the foregoing, under Section 2(d) of the Portal-to-Portal Act of 1947, this Court is without jurisdiction of this action and is without jurisdiction of each and every claim and cause of action referred to in the amended complaint herein.

As and for an eighth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

I.

The matters and claims referred to in the amended complaint herein relate to and are based on acts or omissions of defendant prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947, and relate to the failure of the defendant, as the alleged employer of plaintiff and

the other persons named in Exhibit A of the amended complaint, to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

## II.

The acts or omissions of defendant complained of in said amended complaint herein were in good faith, in conformity with, and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the United States Maritime Commission, an agency of the United States, and in conformity with and in reliance on administrative practices and enforcement policies of such agency, with respect to the class of employers to which defendant belonged. [18]

## III.

By reason of the foregoing, pursuant to Section 9 of the Portal-to-Portal Act of 1947, defendant may not be subjected to any liability for or on account of the matters referred to in the amended complaint herein.

As and for a ninth, further, separate and distinct answer and defense to the amended complaint herein, defendant alleges:

## I.

The acts or omissions of defendant referred to in the amended complaint herein and giving rise to the above-entitled action and the causes of action set forth in said amended complaint, were performed, committed, or omitted by defendant in good faith and with reasonable grounds for belief



that such acts or omissions were not a violation of the Fair Labor Standards Act of 1938, as amended.

## II.

By reason of the foregoing, pursuant to Section 11 of the Portal-to-Portal Act of 1947, this court, in its sound discretion, should award no liquidated damages to plaintiff or any of the persons referred to and named in Exhibit A of the amended complaint.

Wherefore, defendant prays that plaintiff and the persons named in Exhibit A of the amended complaint herein take nothing, and that defendant may be hence dismissed with its costs.

RICHARD DEVERS,

GORDON JOHNSON,

Attorneys for Defendant.

Of Counsel.

HART, SPENCER, McCULLOCH &

ROCKWOOD,

THELEN, MARRIN, JOHNSON &

BRIDGES. [19]

State of Oregon,

County of Multnomah—ss.

Due service of the within Amended Answer to Amended Complaint is hereby accepted at Portland, Oregon, this 21st day of June, 1947, by receiving a copy thereof, duly certified to as such by Richard Devers of attorneys for defendant.

/s/ JAMES LANDYE,

Attorney for Plaintiff.

[Endorsed]: Filed June 24, 1947. [20]

[Title of District Court and Cause.]

### REPLY

Come now the plaintiffs, leave of court being first duly had and obtained, and file this as their reply to the amended answer to the amended complaint, and admit, deny and allege:

#### I.

Deny paragraphs I, II, III, IV, V, VI and VII and the whole thereof, save and except as the same may have been specifically alleged, admitted or modified in plaintiffs' amended complaint or in this reply.

Replying to the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth further and separate and distinct answers and defenses to the amended complaint herein, plaintiffs deny each and every allegation and each and every paragraph therein contained and the whole thereof, save and except as the same may have been specifically alleged, admitted or modified in said amended complaint or in this reply.

For a first further and separate and distinct reply to the first further and separate and distinct answer to the amended complaint, plaintiffs allege that the times set forth in the amended complaint are not trifling periods, but, on the contrary, are composed of a minimum of thirty minutes per day. [21]

For a second separate and further reply, plaintiffs allege that said Act does not apply to plaintiffs in this particular case, in that the work involved in this particular case is not portal-to-portal work;

that, instead, the overtime asked for in this particular case is for work involving guards who had to stand roll call and inspection, receive orders and then go to their posts; that all of said activities consumed thirty minutes; that the employees, by written rule of the company, were required to be at the roll call and at the guard house thirty minutes before actually going to their posts of duty in the particular sections of the yard; that a guard was under the penalty of being fired or discharged if he did not so report for work at this particular time and stand roll call and inspection and have his assignments made; that all of said work and activities were work within the meaning of the Fair Labor Standards Act; that the Portal-to-Portal Act was not intended at any time to cut off or in any way bar suits of this kind and nature; that time is not asked for in this case from the time men reported on the premises, but, rather, it is asked for from the time they were required to report at the guard house under penalty of discharge if they did not do so, and said roll call, inspection and taking of assignments were part of the main activities of guarding said property.

As a third further and separate reply, particularly referring to the matters contained in the sixth, seventh, eighth and ninth further and separate and distinct answers, plaintiffs admit:

# I.

That the claims and causes of action referred to in the amended complaint arose prior to May 14,

1947, the date of the enactment of the "Portal-to-Portal Act of 1947," but expressly deny each and every other allegation contained in said sixth, seventh, eighth and ninth affirmative answers; and plaintiffs allege that said Portal-to-Portal Act of 1947 is unconstitutional as applied to plaintiffs in this case, but particularly sections 2-a, 2-d 9 and 11 of said Act are unconstitutional; that these said causes of action are vested property rights [22] and were vested rights prior to the enactment of the Portal-to-Portal Act of May 14, 1947; that said Act is unconstitutional for the following reasons:

1. It is in violation of the due process clause of the fifth amendment to the Constitution of the United States, in that it seeks to retroactively take away property rights which were vested in the plaintiffs.
2. It is arbitrary and unreasonable, in that it sets up an unreasonable and arbitrary classification of depriving working people as a class of property rights retroactively.
3. Said act, and particularly the sections and subsections above mentioned, are further violative of the due process clause in that said sections, and each of them, impair the obligation of contract in violation of the due process clause of the fifth amendment to the Constitution of the United States; that, particularly section 2-d of said act, although attempting to be written procedurally in terms, actually cuts off all rights of the plaintiffs in both

federal and state courts, and despite the wording of said section 2-d, which is attempting to be procedural in character, actually cuts off and deprives plaintiffs of vested rights under the due process clause of the fifth amendment to the Constitution of the United States.

4. That if the said sections referred to above are construed to apply to plaintiffs in this case, then these said sections are unconstitutional for the reason that the title of said Act is fraudulent, misleading and deceiving and, therefore, deprives plaintiffs in this case of their property without due process of law, in violation of the due process clause of the fifth amendment to the Constitution of the United States; that this is particularly true because plaintiffs in this case were guards who were required to report to work under penalty of discharge, as set forth in the second separate and further reply, and there is no element of portal-to-portal activity involved in this case.

## II.

That, furthermore, sections 2-d, 9 and 11 of said Portal-to-Portal Act are unconstitutional in that these sections violate Article III, sections 1 and 2, of the Constitution of the United States, in that said Act and sections of [23] said act, as stated above, encroach and invade the domain of the judiciary, for the reason that these said sections have attempted to take judicial construction of past acts and past causes of action and to put a congressional

interpretation on said Fair Labor Standards Act of 1938, and by said method have invaded the field of the judiciary, in violation of Article III, sections 1 and 2; further, and particularly applying section 2-d of said Act, said section, although written procedurally in terms, in fact cuts off all rights, leaving no remedy of any kind to plaintiffs, and by such method has denied the court its proper function as a judiciary; further, section 9 is unconstitutional in that it encroaches upon the power of the judiciary, as set forth in Article III, sections 1 and 2, of the Constitution of the United States, in that said section 9 purports to allow a defendant and an administrative branch or agency of the executive arm of the government to interpret said law, rather than the judiciary.

Wherefore, plaintiffs pray for judgment as set forth in the amended complaint and that the court declare unconstitutional sections 2-a, 2-d, 9 and 11 of said Portal-to-Portal Act of 1947.

GREEN & LANDYE,

Attorneys for Plaintiffs.

Service of the foregoing reply is hereby accepted this 3rd day of July, 1947.

/s/ RICHARD DEVERS,

Of Attorneys for Defendant.

[Endorsed]: Filed July 3, 1947. [24]



[Title of District Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947

Now comes the United States of America, by its Attorney General, and pursuant to the Act of August 24, 1937 (c. 754, sec. 1, 50 Stat. 751, 28 U.S.C. § 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947, and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said Act, or any part thereof, upon the ground that it is unconstitutional. [25]

The United States moves also for leave to file a brief in support of the constitutionality of the

said Portal-to-Portal Act of 1947, within 30 days after service upon it of plaintiff's brief on the constitutional issue or such other time as the Court may deem reasonable.

TOM C. CLARK,  
Attorney General.

By /s/ PEYTON FORD,  
Assistant Attorney General.

/s/ HENRY L. HESS,  
United States Attorney.

Of Counsel:

ENOCH E. ELLISON,  
Special Assistant to the Attorney General.

JOHANNA M. D'AMICO,  
Attorney, Department of Justice.

[Endorsed]: Filed August 19, 1947. [26]

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[Title of District Court and Cause.]

### ORDER

This matter having come on regularly for hearing on the 8th day of September, 1947, on the motion of the United States of America to intervene and for time within which to file brief in support of the constitutionality of the Portal-to-Portal Act of 1947 before the above-entitled Court, the Honorable Claude McCulloch, United States District Judge, James Landye, Esq. (of Messrs. Green & Landye)



appearing on behalf of the plaintiff, Richard Devers, Esq. (of Messrs. Hart, Spencer, McCulloch & Rockwood), appearing on behalf of the defendant, and Henry L. Hess, United States Attorney for the District of Oregon, appearing on behalf of the United States of America; and

It Appearing to the Court and the Court finds that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States of America nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party thereto.

It Is Hereby Ordered that the said petitioner, the United States of America, be and it is hereby granted leave to intervene in this action herein and that said petitioner is hereby granted leave to file its pleading of the United States of America in intervention, and the Clerk of this Court is hereby ordered to file immediately said pleading which was tendered with said motion to intervene.

The Court having heretofore held the Portal-to-Portal Act of 1947, approved May 14, 1947, to be constitutional as applied to this case, the United States of America waived the provisions of said motion relative to time in this Court within which to file a brief upon the constitutionality of the Portal-to-Portal [27] Act of 1947;

It Is, Therefore, Further Ordered that no time be granted for the filing of a brief on the part of the United States of America as to the constitutionality of said Act.

Done in open court this 8th day of September, 1947.

CLAUDE McCULLOCH,  
United States District Judge.

[Endorsed]: Filed September 10, 1947. [28]

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[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES  
IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.
2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.
3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question. [29]

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,

By /s/ PEYTON FORD,

Assistant Attorney General.

/s/ HENRY L. HESS,

United States Attorney.

Of Counsel:

ENOCH E. ELLISON,

Special Assistant to the Attorney General,

JOHANNA M. D'AMICO,

Attorney, Department of Justice.

[Endorsed]: Filed September 10, 1947. [30]

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[Title of District Court and Cause.]

#### MEMORANDUM OF DECISION

I think the facts of this case bring it within the Portal-to-Portal Act. I have previously held that the part of the Act withdrawing jurisdiction was constitutional.

The case will therefore be dismissed for want of jurisdiction.

Dated this 21st day of January, 1948.

CLAUDE McCOLLOCH,

Judge.

[Endorsed]: Filed January 21, 1948. [31]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the above entitled Court, Honorable Claude McCulloch, United States District Judge, presiding, on the 25th day of June, 1947, James Landye, Esq. (of Messrs. Green and Landye), appearing on behalf of the plaintiffs, and Richard Devers, Esq. (of Messrs. Hart, Spencer, McCulloch and Rockwood), and Gordon Johnson, Esq. (of Messrs. Thelen, Marrin, Johnson & Bridges), appearing on behalf of the defendant.

Evidence both oral and written and the stipulation of the parties having been submitted and the defendant having moved the Court to dismiss the action upon the ground that on the facts and the law the plaintiffs have shown no right to relief for the reason that under Section 2(a) of the Portal-to-Portal Act of 1947 no liability exists on the part of the defendant to the plaintiffs, or any of them, and for the further reason that under Section 2(d) of the Portal-to-Portal Act of 1947 the Court is without jurisdiction over the claims involved in this case, and the Court having considered the evidence and the stipulations of the parties, finds the facts and states the conclusions of law on the jurisdictional issue as follows:

## FINDINGS OF FACT

1. That this action was brought to recover from defendant unpaid overtime compensation and an additional amount equal to the amount of such unpaid overtime compensation as liquidated damages, pursuant to the Fair Labor Standards Act of 1938 (29 U. S. C. A., sections 201-219, inclusive), hereinafter referred to as the Act. [32]

2. In the period from February 1, 1942, to March 4, 1945, plaintiffs served as guards at the shipyard operated by defendant for the United States of America, acting by and through the United States Maritime Commission, which shipyard was located at Swan Island, in the City of Portland, State of Oregon.

That the plaintiffs were required to report for roll call at the guardhouse 30 minutes prior to relieving the shift on duty; that, during this said 30 minutes, plaintiffs were required to stand roll call, inspection, receive assignments, and to proceed to their posts of duty which were varying distances from the guardhouse; that the said guardhouse was located on the property inside the gate at Swan Island; that the plaintiffs worked 30 minutes per day during the period above mentioned, namely from February 1, 1942, to March 4, 1945, six days a week, without receiving overtime compensation; that the plaintiffs were not only required to report 30 minutes prior to the time on the premises of the employer but were disciplined for failure to do so.

3. The hours of overtime for which plaintiffs seek compensation by their complaint herein relate

to activities which were preliminary to or postliminary to the principal activity of plaintiffs as aforesaid, namely, guarding said shipyard; and plaintiffs have been paid in full for all services performed by them in the performance of said principal activity.

4. Neither the United States of America, the United States Maritime Commission, nor defendant, agreed or contracted, in writing or otherwise, with plaintiffs or any of them, either directly or through any agent or collective bargaining representative of them or any of them, to make compensable the time spent by plaintiffs or any of them in activities preliminary or postliminary to their principal activity, to wit, guarding said shipyard. The only contract, written or otherwise, between plaintiffs or any of them and defendant, the United States of America, or the United States Maritime Commission with respect to employment at said [33] shipyard was that plaintiffs and each of them would be compensated and paid for the time spent by them in actually guarding said shipyard, as distinguished from any preliminary or postliminary activities in connection therewith. Said contract has been fully performed and plaintiffs and each of them have been fully paid and compensated for the time spent in actually guarding said shipyard; and, in fact, none of the plaintiffs contend or assert that such contract has not been fully performed.

5. During the period referred to above in which plaintiffs performed services as guards at said shipyard, there was not in effect there any practice,



custom or usage under which guards or any other employees at said shipyard were compensated or paid for time spent before or after the performance of their principal activities, guarding said shipyard. Neither the United States of America, the United States Maritime Commission, nor the defendant, had ever, in said period, compensated or paid guards at said shipyard for reporting time, time spent in preparation for duty, time spent in roll call, time spent in assignments to post or receipt of instructions, time spent going to or from posts of duty, or time spent checking out. The practice, custom and usage at said shipyard in said period with respect to computing time worked by guards was to allow for and count only the time actually spent by the guards, including the plaintiffs, at their posts of duty and while guarding said shipyard.

### CONCLUSIONS OF LAW

1. That the Court has jurisdiction of the parties.
2. There was no express provision of a written or non-written contract in effect, at the time plaintiffs served as guards at said shipyard, between plaintiffs or their agents or collective bargaining representative and defendant or the United States of America or the United States Maritime Commission pursuant to which the preliminary and postliminary activities referred to above and the time spent in performing the same were [34] compensable, either with respect to straight-time compensation, or overtime compensation.



3. There was not in effect, at the time plaintiffs served as guards as hereinbefore referred to, a custom or practice at said shipyard where said services were performed, covering said preliminary or postliminary activities, and not inconsistent with a written or nonwritten contract in effect as such time between plaintiffs and defendant, the United States of America or the Maritime Commission, under which said preliminary and postliminary activities were compensable, either by way of straight-time or overtime compensation.

4. That under the provisions of Section 2(d) of the Portal-to-Portal Act of 1947 this Court has no jurisdiction over this action, for the reason that it is an action to enforce liability for or on account of the failure of the alleged employer of plaintiffs to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended, with respect to an activity which was not compensable under Section 2(a) or Section 2(b) of the Portal-to-Portal Act of 1947.

5. The case should be dismissed for want of jurisdiction.

Dated this 21st day of January, 1948.

CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed January 21, 1948. [35]

In the District Court of the United States  
for the District of Oregon

Civil No. 3030

C. T. POTTER,

Plaintiff,

vs.

KAISER COMPANY, INC., a corporation,

Defendant.

JUDGMENT DISMISSING ACTION FOR  
WANT OF JURISDICTION

This action came on for trial before the above entitled Court, Honorable Claude McCulloch, United States District Judge, presiding, on the 25th day of June, 1947, James Landye, Esq. (of Messrs. Green and Landye), appearing on behalf of the plaintiffs and Richard Devers, Esq. (of Messrs. Hart, Spencer, McCulloch and Rockwood), and Gordon Johnson (of Messrs. Thelen, Marrin, Johnson & Bridges), appearing on behalf of the defendant.

Evidence both oral and written having been submitted and stipulations made, and the defendant having moved the Court to dismiss the action upon the ground that on the facts and the law the plaintiffs have shown no right to relief, for the reason that under Section 2(a) of the Portal-to-Portal Act of 1947, no liability exists on the part of the defendant to the plaintiffs, or any of them, and for the further reason that under Section 2(d) of the

Portal-to-Portal Act of 1947, the Court is without jurisdiction over the claims involved in this case, and the Court being advised:

It Is Ordered and Adjudged that this action, and each and every claim involved therein, be dismissed for want of jurisdiction.

Costs to neither party.

Dated this 21st day of January, 1948.

CLAUDE McCOLLOCH,  
Judge.

Judgment entered in docket January 21, 1948.

[Endorsed]: Filed January 21, 1948. [36]

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In the District Court of the United States  
for the District of Oregon

Civil No. 3030

C. T. POTTER, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC., a corporation,

Defendant,

THE UNITED STATES OF AMERICA,

Intervenor.

### NOTICE OF APPEAL

Notice is hereby given that the plaintiffs, and each of them, hereby appeal to the Circuit Court of Appeals, Ninth Circuit, from that final judgment,

and from the whole thereof, entered herein on January 21, 1948, under which the Court dismissed said cause for lack of jurisdiction.

Dated: this 13th day of February, 1948.

GREEN, LANDYE &  
PETERSON,  
/s/ JAMES LANDYE,  
Attorneys for Plaintiffs.

[Endorsed]: Filed February 16, 1948. [37]

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Fidelity and Deposit Company of Maryland,  
Baltimore  
4915674

[Title of District Court and Cause.]

#### BOND FOR COSTS ON APPEAL

Whereas, C. T. Potter, et al., plaintiffs in the above entitled action, appeal to the Circuit Court of Appeals from a judgment made and entered against said plaintiffs on January 21st, 1948,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and empowered to become surety upon bonds, undertakings, etc., does hereby undertake and promise, on the part of the appellant, that said appellant will pay all costs in a sum not exceeding Two Hundred Fifty and No/100ths Dollars (\$250.00), if the appeal is dismissed or the

judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

[Seal]

FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND,  
By CLARENCE D. PORTER,  
Attorney in Fact.

Countersigned:

CLARENCE D. PORTER,  
Resident Agent.

[Endorsed]: Filed Feb. 16, 1948. [38]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
PLAINTIFFS-APPELLANT INTEND TO  
RELY ON APPEAL

Come now the plaintiffs-appellant and each of them herein, and make this, their statement of points upon which they intend to rely on appeal of this case to The United State Circuit Court of Appeals for the Ninth Circuit:

1. That the Portal-to-Portal Act of 1947 and each provision and part of said Act has no application to the facts in this case.
2. If the Portal-to-Portal Act has application to the facts in this case, that said Act is unconstitutional; that particularly the provisions of Sections 2-A, 2-D, 9 and 11 of said Act are unconstitutional as applied to these plaintiffs-appellant in that said provisions of said Act violate the Due Process Clause of the Fifth Amendment of the Constitution of the United

States and violate Article III, Sections 1 and 2, of the Constitution of the United States.

Dated: this 18th day of March, 1948.

GREEN, LANDYE &  
PETERSON,

By /s/ JAMES LANDYE,

Attorneys for Plaintiff-  
Appellant.

Service Accepted 3/18/48.

E. B. TWINING,  
Asst. U. S. Atty.

Service Accepted 3/18/48.

RICHARD DEVERS,  
Of Attys. for Defendant.

[Endorsed]: Filed March 18, 1948. [39]

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[Title of District Court and Cause.]

PLAINTIFFS-APPELLANTS' DESIGNATION  
OF RECORD ON APPEAL

Come now plaintiffs-appellants in the above entitled case and designate the record desired on appeal, as follows:

1. Amended complaint.
2. Amended answer to amended complaint.
3. Reply.
4. Motion of U. S. to intervene.
5. Order of intervention of U. S.
6. Pleading of U. S. in intervention.
7. Memorandum of decision.
8. Findings of fact and conclusions of law.
9. Judgment of dismissal.
10. Notice of appeal.
11. Appeal bond.

12. Entire stenographic transcript.
13. Exhibit 31, photostat copy.
14. Plaintiffs-appellants' statement of points on appeal.
15. Designation of record on appeal.
16. Docket entries.

Dated this 17th day of March, 1948.

JIM LANDYE,  
GREEN, LANDYE &  
PETERSON

Attorneys for Plaintiffs-  
Appellants.

[Endorsed]: Filed March 18, 1948. [40]

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[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

The appellee, Kaiser Company, Inc., hereby designates the following additional portions of the record and proceedings in this case to be contained in the in the Record on Appeal:

1. Summons.
2. Appellee's designation of additional portions of Record on Appeal.

GORDON JOHNSON,  
THELEN, MARRIN,  
JOHNSON & BRIDGES,  
RICHARD DEVERS,  
HART, SPENCER,  
McCULLOCH & ROCKWOOD,  
Attorneys for appellee  
Kaiser Company, Inc.



State of Oregon,  
County of Multnomah—ss.

Due service of the within Appellee's Designation of Additional portions of Record on Appeal is hereby accepted at Portland, Oregon, this 26th day of March, 1948, by receiving a copy thereof, duly certified to as such by Richard Devers of attorneys for Appellee.

GREEN, LANDYE &  
PETERSON,  
JAMES LANDYE,  
Attorney for Appellants.

HENRY L. HESS,  
United States Attorney,  
of Attorneys for Intervenor.

[Endorsed]: Filed March 26, 1948. [41]

Service of the foregoing plaintiffs-appellants' designation of record on appeal is hereby accepted this 18th day of March, 1948.

/s/ RICHARD DEVERS,  
Of Attorneys for  
Defendants-Respondents.

HENRY L. HESS,  
U. S. Attorney for the  
District of Oregon.

By /s/ EDWARD B. TWINING,  
Of Attorneys for Intervenor.

[Title of District Court and Cause.]

## DOCKET ENTRIES

1946

Jan. 17—Filed Complaint.

Jan. 17—Issued summons—to Marshal.

Jan. 24—Filed summons with return.

Feb. 14—Filed motion for additional time to plead.

Feb. 14—Filed and entered order granting additional time to answer or otherwise plead.  
Fee.

Mar. 12—Answer of Defendant.

1947

Feb. 4—Filed plaintiffs' interrogatories.

Feb. 14—Filed stipulation for order extending time to answer plaintiffs' interrogatories to March 19.

Feb. 14—Filed and entered order extending time to answer plaintiffs' interrogatories to March 19, McC.

Mar. 15—Entered order setting for pre-trial on March 24, 1947 notified, McC.

Mar. 20—Filed stipulation for order extending to April 9, 1947, to answer plaintiffs' interrogatories. McC.

Mar. 20—Filed and entered order extending to April 9, 1947, to answer plaintiffs' interrogatories. McC.

Mar. 24—Entered record of pre-trial conference.

Mar. 26—Memorandum following pre-trial filed in Civ. 3008 which see.

1947

- Apr. 3—Filed stipulation for order to file amended complaint.
- Apr. 3—Filed and entered order to file amended complaint. McC.
- Apr. 3—Filed Amended Complaint.
- Apr. 7—Entered order setting for trial on issue of liability on June 3, 1947 notified. McC.
- Apr. 9—Filed Defendant's objections to Plaintiffs' Interrogatories.
- Apr. 9—Filed stipulation for order allowing to May 1, 1947, for defendant to answer or plead.
- Apr. 9—Filed and entered order allowing to May 1, 1947, for defendant to answer or plead. McC.
- Apr. 30—Filed stipulation for additional time to answer or plead.
- Apr. 30—Filed and entered order allowing defendant to May 12 to plead. Driver.
- May 12—Filed stipulation for order allowing to May 22, 1947, for defendant to answer or plead.
- May 12—Filed and entered order allowing to May 22, 1947, for defendant to answer or plead. McC.
- May 15—Entered order resetting for trial on June 12, 1947, notified. McC.
- May 22—Filed Answer to Amended Complaint.
- June 6—Entered order resetting for trial on June 24, 1947. McC.
- June 24—Filed stipulation for order allowing defendant to file amended answer.

1947

- June 24—Filed and entered order allowing defendant to file amended answer. McC.
- June 24—Filed stipulation for order allowing plaintiffs 10 days to file reply.
- June 24—Filed and entered order allowing plaintiff 10 days to file reply. McC.
- June 24—Filed amended answer to amended complaint.
- June 24—Record of trial before court. McC.
- June 25—Record of trial before court. McC.
- June 26—Record of trial before court. McC.
- June 26—Filed bundle of card assignments.
- June 30—Filed trial exhibits 1 to 31 inclusive excepting 3.
- July 3—Filed reply to the amended answer.
- July 21—Mailed Judge McCulloch's certificate with copies pleadings to Atty. General.
- July 31—Filed 14 additional card assignments.
- Aug. 19—Filed motion of U. S. Atty. for leave to intervene, and for order to file pleading of U. S. in intervention.
- Sept. 5—(Filed and entered order consolidating Civ. 3269 Verberg v. Kaiser Co. and that all further entries be made in this Civ. 3030 case). McC.
- Sept. 8—Entered order allowing intervention of United States. McC.
- Sept. 10—Filed order allowing intervention of United States. McC.
- Sept. 10—Filed pleading of United States in intervention. [43]

1947

- Nov. 10—Filed stipulation for amended order consolidating causes Civ. 3399 and 3030.
- Nov. 10—Filed motion for amended order consolidating causes Civ. 3399 and 3030.
- Nov. 17—Entered order resetting for hearing on Nov. 18, 1947, 1:30 p.m., defendant's Findings, Conclusions and Motion to Dismiss. McC.
- Nov. 18—Record of hearing on motion to amend Findings of Fact and Conclusions of Law and settlement of same; and order continuing to further order.
- Dec. 26—Filed Transcript of Proceedings June 24-26/1947.
- Dec. 26—Filed Copy Transcript of Proceedings, June 24-26/1947.

1948

- Jan. 2—Entered order setting for Jan. 12, 1948, 2 p.m., for settlement of Findings and Conclusions—McC. notices.
- Jan. 12—Record of hearing in settlement of Findings—argued—reserved. McC.
- Jan. 21—Filed memorandum of decision. McC.
- Jan. 21—Filed and entered Findings of Fact and Conclusions of Law. McC.
- Jan. 21—Filed and entered Judgment dismissing action for want of jurisdiction. McC.
- Feb. 16—Filed notice of appeal by plaintiffs.
- Feb. 16—Filed bond for costs on appeal.
- Feb. 16—Mailed copies notice of appeal to Henry L. Hess, and Hart, Spencer, McC. & R.

1948

- Mar. 16—Filed stipulation for order allowing appellant to and including May 1, 1948, to file and docket appeal.
- Mar. 16—Filed and entered order allowing appellant to and including May 1, 1948, to file and docket appeal. McC.
- Mar. 18—Filed designation of record on appeal.
- Mar. 18—Filed statement of points to rely on appeal.
- Mar. 26—Filed appellee's designation of additional portions of record on appeal.
- Mar. 31—Filed and entered order to forward photostatic copies of Exhibit 31 to C.C.A. McC. [44]

United States of America,  
District of Oregon—ss.

### CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 46 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3030, in which C. T. Potter is Plaintiff and Appellant, and Kaiser Company, Inc., a corporation, is defendant and Appellee; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant,

and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony of June 24-26, 1947, taken and filed in this office in this cause, together with photostat copy of exhibit No. 31 filed in this cause.

I further certify that the cost of comparing and certifying the within transcript is \$32.00, and the cost of filing notice of appeal is \$5.00, making a total of \$37.00, and that the same has been paid by the said appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 31st day of March, 1948.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy. [46]



In the District Court of the United States  
for the District of Oregon

Before: Honorable Claude McCulloch,  
Judge.

Civil No. 3030

C. T. POTTER,

Plaintiff,

vs.

KAISER COMPANY, INC., a corporation,  
Defendant.

Portland, Oregon, June 24, 1947

Appearances:

Mr. James Landye (Green & Landye), of Attorneys for Plaintiff.

Mr. Richard Devers (Hart, Spencer, McCulloch & Rockwood) and Mr. Gordon Johnson (Thelen, Marrin, Johnson & Bridges) of Attorneys for Defendant.

Mr. Henry L. Hess, United States Attorney.

## TRANSCRIPT OF PROCEEDINGS

\* \* \* \* \*

### Plaintiff's Testimony

#### COLLYER T. POTTER

one of the plaintiffs herein, was thereupon produced as a witness and, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Landye:

Q. Your name is Collyer T. Potter?

A. Yes.

(Testimony of Collyer T. Potter.)

Q. You are a plaintiff in this case, is that correct?      A. Yes.

Q. Where do you live?

A. 2945 North Willamette Boulevard.

Q. How long have you lived there?

A. I have lived at that particular address about six years now.

Q. Have you lived in Oregon most of your life?

A. Yes, I have.

Q. When did you first go to work, if you recall, for the Kaiser Company, Inc., at Swan Island, if you remember?

A. I believe it was May 5, 1942.

Q. What was your job?      A. Guard.

Q. As a guard?      A. Yes.

Q. Then when did you leave that employment, Mr. Potter?

A. I think it was March, 1945, I believe [128\*]

Q. March of 1945?      A. Yes.

Q. What was your rank, whatever you want to call it, when you first went to work there?

A. Well, I suppose it would be comparable to a private in the Army.

Q. You were just an ordinary guard, is that correct?

A. Yes, that is right, just an ordinary guard.

Q. Then, later on, were you promoted?

A. Sergeant.

Q. Then, later on, you became a lieutenant, is that correct?      A. That is right.

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\* Page numbering appearing at top of page of Reporter's certified Transcript of Record

(Testimony of Collyer T. Potter.)

Q. In this case, to make the record clear, you are not claiming any overtime compensation from the time you were a lieutenant, is that correct?

A. That is right.

Q. That is the time you were second in command?

A. That is right.

Q. Down at the Swan Island Yard, where is the guardhouse, the place that they assemble, where the guards assemble?

A. I would say it is down about a half mile from the entrance to the yard on what we call the outfitting basin. It would be on the east side of Swan Island proper.

Q. Tell the Court, what time did you report for work?

Mr. Johnson: Just a minute. I want to object to that on [129] the ground it calls for an opinion.

Mr. Landye: I withdraw the question.

Q. Tell us in just a few of your own words what you would do, what time you would get there, when you went on shift and so forth?

A. What time?

Q. Yes. What time and just exactly what you would do?

A. From the time we arrived at the guardhouse?

Q. Yes. What would you do?

A. We were required to put on our uniforms and get ready for roll call.

Q. What time would roll call be?

A. Usually a half hour before we went on duty. We had to be there a half hour before we went on duty.

(Testimony of Collyer T. Potter.)

Q. What did you do at roll call?

A. Well, we had inspection and reading of orders and assignment of the men to the various posts in the yard, and instructions to the guards.

Q. Instructions to the guards?

A. That is right.

Q. How long would that take?

A. I would say it would probably average about ten minutes.

Q. About ten minutes? A. Yes.

Q. Then, what happened after that?

A. After that, the men were to march to various posts in the [130] yard.

Q. When you say "march," did you walk or go down in formation?

A. No, we walked, very definitely walked there.

Q. Did you march? Go in military formation, in squads or whatever you call it?

A. That is right.

Q. Then what happened?

A. Then the men would be assigned to various posts in the yard.

Q. You arrived at your posts, then, a half hour later, is that correct? A half hour from the time you first had your roll call?

A. Well, yes, it would depend on the distance it is from the guardhouse. It might approximate a half hour.

The Court: Maybe he meant he had to be there a half hour before roll call. A half hour before what? He has not made that clear. He said he was required to be there a half hour before what? Before what?

(Testimony of Collyer T. Potter.)

Q. (By Mr. Landye): You say were were required to be there a half hour—you were required to be there for roll call a half hour before——

The Court: No. He said he was required to be there a half hour before what?

A. Before roll call.

The Court: Take your time.

Q. (By Mr. Landye): Let us go back a minute. Let us take a shift. Suppose you had to actually start guarding a particular ship at 4:30, we will say, in the afternoon. A. Yes.

Q. What time did you have to be in the guard-house for roll call?

Mr. Johnson: Just a minute. I want to object to that question on the ground that there is no question of a hypothesis involved at all. Let us find out what shift this witness was working on and when he came and then we will know what the facts are.

Mr. Landye: All right.

Q. What time, for instance, did your shift start?

A. Well, for instance, if we were required to go on duty at 4:30——

Q. Yes. A. ——we would be——

Mr. Johnson: Just a minute. I want to object to this on the ground it is not responsive. He is not being asked a hypothetical question but a factual question.

The Court: Go ahead.

(Testimony of Collyer T. Potter.)

Q. (By Mr. Landye): Go ahead.

A. Our hours were different. Assuming we had to go on duty at 4:30, well——

The Court: We just want to get the facts.

A. ——we were required to be there at 4:00 o'clock.

The Court: What would the name of that shift be, beginning at 4:30? [132]

Q. (By Mr. Landye): Would that be the swing shift? A. That would be the swing shift.

The Court: Assuming that the swing shift began at 4:30, what time would you have to be at the guardhouse? A. 4:00 o'clock.

Q. (By Mr. Landye): Then, at 4:00 o'clock is when they started the roll call, is that correct?

A. That is right.

Q. Would it be between 4:00 and 4:30 you were talking about that you would have roll call, inspection, assignment to shifts and march to your posts, is that correct? A. That is right.

Q. That would take up the half hour?

A. Yes.

Q. That guardhouse, where you have to have roll call, is that located on the Kaiser premises?

A. Yes.

Q. At Swan Island? A. Yes.

Q. You were a lieutenant of the guards, is that correct? A. Yes.

Q. I want to ask you, Mr. Potter, if you have ever discharged a man for not reporting a half hour before he actually had to be at his post, or recommended his discharge?

(Testimony of Collyer T. Potter.)

A. Well, yes. What we lieutenants did there was, usually speaking, [133] to refer it to the chief. As a general rule, he supported our decision and if we recommended a man be discharged for some dereliction in duty or failure to report, for instance, he would usually sustain it and he was discharged.

Q. Where you have so recommended as a lieutenant, was a single man discharged for not being there at 4:00 o'clock——

A. Very definitely, yes.

Q. ——for roll call?

A. That is right.

Q. In connection with that, was there a series of instructions that were sent out and given to the various guards, while you were working down there?

A. That is right.

Mr. Landye: May I have this folder marked for identification?

(Folder containing instructions to guards thereupon marked Plaintiff's Identification No. 31.)

Q. Showing you Plaintiff's Identification 31, I will ask you what that is, sir?

The Court: Tell me what it is. You know what it is.

A. We got numerous——

The Court: You just tell me.

Mr. Landye: Contained in Plaintiff's Identification No. 31 are numerous bulletins, one of which is issued by Mr. Utley, Chief of the Guards, dated



(Testimony of Collyer T. Potter.)

March 11, 1945, sent to three lieutenants and various sergeants, giving certain instructions concerning guards' behavior.

Beginning on the next page is Part 1 of General Instructions, and that continues for quite a number of pages, and the point particularly I wish to draw the Court's attention to is that language under 4, "Deportment," which states: "All members should be prepared to stand roll call thirty minutes prior to relieving the shift on duty. They shall report at Guard Headquarters before going on duty and at the expiration of their tour of duty. Each member will see that a complete and detailed report is submitted as to all activities occurring during that period."

They were required by this rule to be there thirty minutes early for roll call before they actually took up their posts.

The Court: What did they do at the end of the shift?

Mr. Landye: Then, at the end of the shifts, it says here that they were to sit down and make out various reports as to all activities. The time that we are talking about, that is in controversy here, is this half hour's time——

The Court: Before?

Mr. Landye: Yes, a half hour before.

The Court: You do not have—you do not think you have any claim at the end of the shift?

Mr. Landye: I think perhaps there is a claim, but we are limiting the showing to merely for thirty

(Testimony of Collyer T. Potter.)

minutes before actually [135] going to work, or to the thirty minutes for roll call. They were required to be there or be fired.

Q. There is also attached to that a letter or bulletin, later on in this file, dated March 24, 1944, in which Captain Utley again sends out certain instructions and he says, on page 4: "Beginning next Monday, if I see a man in roll call without his Sam Brown belt (those that have them); without full uniform, or who is not cleanly shaven, I am going to send that man home to clean up or to put on the rest of his uniform. There will be frequent inspections at roll call. They will not be announced." Then he tells of the various things he is going to come down to do.

The Court: That all seems proper enough, what you have read there.

Mr. Landye: If we are paid for it, it is proper enough. It is this half hour we are talking about and objecting to.

The Court: Do you want to develop the facts about the uniforms a little? Whom did they belong to?

Q. (By Mr. Landye): Who owned the uniform?

A. The uniforms belonged to the Kaiser Company.

Q. Were they kept there or were they kept by the individual?

A. Some wore them home, and I believe most of them left them there at the guardhouse in lockers that they provided for that purpose.

(Testimony of Collyer T. Potter.)

Q. Let me ask you this question: At 4:00 o'clock, when you [136] reported for roll call, were you required to be in uniform at that time? A. Yes.

Q. If there was any changing from civilian to your guard clothes, that was done prior to 4:00 o'clock? A. That is right.

Mr. Landye: At this time, your Honor, I would like to offer Exhibit No. 31, for identification, in evidence.

Mr. Johnson: Do I understand that this testimony is being offered at this time in connection with the inquiry as to whether or not the claims here involved are subject to the Portal-to-Portal Act of 1947?

Mr. Landye: Yes, and it also goes in for several reasons, not only jurisdiction, the jurisdictional question, but also the question that they were actually required to be there.

Mr. Johnson: I might say this, your Honor: My only point is that I understood from the notices that we had with respect to this particular proceeding that the matter was set for trial on the coverage issue and then that it developed yesterday, by reason of the Portal-to-Portal Act, the Court felt that some inquiry should be made into the jurisdictional question.

I take it, in view of the fact that the case was set for trial on the coverage issue, we are not trying now the merits and details of the claims, but this is offered at this time on the jurisdictional point, is that right? [137]

(Testimony of Collyer T. Potter.)

Mr. Landye: Yes, and for any other purpose that might come in later.

Mr. Johnson: I am not clear on that point. I did not want to go into a trial on the merits at this time. It was my understanding—

Mr. Landye: I understood what the Court wanted was more information; that, as our case would be somewhat different than I think a Portal-to-Portal case would be, the Court wanted before it, some place in these proceedings, information as to what these men actually did, what their claim is.

The Court: We are trying the whole case.

Mr. Johnson: If your Honor please, my understanding of the notice sent out by the Clerk's office was that the Potter case was set for trial on the coverage issue.

The Court: Liability.

Mr. Johnson: I thought it was with respect to the Adams case that the notice on liability came out. In fact, if I remember correctly, the memorandum issued by your Honor, following the pre-trial of March 26th, 1947, concludes "These cases will proceed to trial on the issue of coverage." That is the way my copy reads. I think that is correct.

My point is, that was the issue that I understood we were going to try at this time, except as to the additional issue which arose yesterday that, since Mr. Landye claims that these cases are not covered by the Portal-to-Portal Act, he would make [138] some showing today on the jurisdictional issue so that your Honor could determine whether or not

(Testimony of Collyer T. Potter.)

you could go to the coverage issue, as far as the merits of the claims are concerned. I, therefore, am not prepared. I do not have the witnesses available.

The Court: By "merits," you mean a factual statement like you have just been making?

Mr. Johnson: Yes.

The Court: That they had to be there at a certain time, and something about these clothes——

Mr. Johnson: Yes. I would want to call a witness to rebut this testimony when we get to that point, but my understanding now is we are acting on the jurisdictional problem and, therefore, the burden is on the plaintiff.

The Court: Let me put it this way: I think I understand you. I won't force any issue that you are not prepared on for final determination. This case may end short of it.

Mr. Johnson: That is my point.

Mr. Landye: I move to have Identification No. 31 received in evidence. Do you object to it?

Mr. Johnson: Yes. I will place a general objection on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid for the introduction of the document.

Mr. Landye: If necessary, I can put one of your men on the [139] stand to lay the foundation for it or I can put the actual man on the stand who got it out, if that is what you want, and prove, if you want me to do that, that this bulletin was issued to all guards. You have got a copy of it.

(Testimony of Collyer T. Potter.)

Mr. Johnson: I just got one about fifteen minutes ago. As a matter of fact, I will admit that it was issued but whether it was issued to all guards or not I don't know.

Mr. Landye: Let me ask the witness a question.

Q. Referring to Plaintiff's Identification No. 31, and particularly referring to the part entitled "General Instructions," was that issued and given to all of the various guards that went to work there?

A. Yes.

Q. At Swan Island? A. Yes.

Mr. Johnson: Wait a minute. I am going to object to that on the ground that no proper foundation has been laid to show that this witness would have any knowledge with respect to all guards.

The Court: Was it issued to him?

Q. (By Mr. Landye): Was it issued to you?

A. Yes, it was.

Q. You were a lieutenant, weren't you?

A. Yes.

Q. Was it issued to everybody under your direct command? A. Yes.

Mr. Johnson: Just a minute. I object to that on the ground that no proper foundation has been laid.

The Court: Was it issued to him when he was a guard?

Q. (By Mr. Landye): Was it issued to you when you were a guard? A. Yes.

Q. Who is Mr. Austin E. Utley?

A. Chief of Guards.



(Testimony of Collyer T. Potter.)

Mr. Landye: I will show you, Mr. Johnson, the other portions of this exhibit. Here is Mr. Utley's signature. I will ask you whether you admit it was sent out to all the people indicated there?

Mr. Johnson: Yes. I will agree that this document indicates that it was issued by Captain Utley to certain persons to whom it is addressed. I refer to the memorandum of March 11, 1944, and the memorandum of March 24, 1944.

Mr. Landye: And the same thing with reference to General Instructions?

Mr. Johnson: Yes. I will admit, also, that Captain Utley was the Chief of the Guards at the Swan Island Yard on the date shown on these two documents, namely March 11, 1944, and March 24, 1944.

Mr. Landye: I think that is all. I will move to admit it in evidence.

Mr. Johnson: I wish to object to its admission, generally, [141] with respect to any persons other than those to whom it is addressed with the exception of the one he testified to. I believe one of these documents was given to him when he came to work.

Mr. Landye: That was the general instructions.

Mr. Johnson: Yes.

Mr. Landye: Correct.

The Court: Admitted.

(Pamphlet containing Instructions to Guards, etc., thereupon received in evidence and marked Plaintiff's Exhibit No. 31.)



## PLAINTIFF'S EXHIBIT NO. 31

\* \* \* \* \*

I have noticed a great deal of laxity or misunderstanding on the part of some of the guards. It seems that they do not realize that they are on duty any time they are around the yard. Regardless of whether it is their day off; whether coming off shift or going on shift. They should be instructed that at the scene of any disorder or disturbance such as occurred at the cafeteria like last night and other times in the past. It is any officer's duty to assist those on duty at such a time. Please see that your men are instructed accordingly and those who fail to comply with this instruction, have them turn their equipment in at once.

\* \* \* \* \*

## Part I. General Instructions.

## 1. General Outline of Department

\* \* \*

Guards should always remember that in the execution of their duties, they act not for themselves, but for the Company. \* \* \*

## 3. Reasons for Dismissal.

1. Drinking before coming on duty or while on duty, being under the influence of liquor while on duty in uniform at any time.

\* \* \* \* \*

## 4. Deportment.

All members should be prepared to stand roll call thirty minutes prior to relieving the shift on duty. They shall report at Guard Headquarters before going on duty and at the expiration of their tour of duty. Each member will see that a complete and

detailed report is submitted as to all activities occurring during that period.

\* \* \* \* \*

### Lieutenants' Duties.

The Lieutenant shall have, in the absence of the Chief Guard, supervision over all members of the guard and shall see that such guards are detailed to their respective beats, and that such beats are properly patrolled. In the absence of the Chief of Guards, the Lieutenants will be responsible for the efficient conduct of the unit. The Lieutenant will inspect the members of the unit prior to going on duty and inspect the unit at frequent intervals during his tour of duty, rendering a written report of his activities at the conclusion of his tour of duty. He will cause his patrol to assemble in time for roll call before each shift change, making necessary reports of all absentees and shall conduct himself in accordance with all rules and regulations pertaining to the Guard Department.

\* \* \* \* \*

General: It is quite noticeable that we have some members in our department who seem to be interested only in pay days or getting time. They report for roll call; they are assigned to their posts, and then just idle the time away until the final whistle.

\* \* \*

Beginning next Monday, if I see a man in roll call without his Sam Brown belt (those that have them); without full uniform, or who is not cleanly shaven, I am going to send that man home to clean up or to put on the rest of his uniform. There will be frequent inspections at roll call. They will not be announced. \* \* \*

(Testimony of Collyer T. Potter.)

Q. (By Mr. Landye): Referring now to the time before you were a lieutenant, what did you do or, tell us specifically, when you were doing this guarding, did you guard ships or facilities or what did you do when you were guarding? What was your job, your particular job?

A. Well, when you act as an ordinary guard?

Q. Yes.

A. Well, being posted on some particular spot, it was your business to look out for fires and sabotage and various things that might happen there that would be detrimental to the carrying on of the work?

Q. Do the Instructions to the Guards which were issued to everybody generally, or in more detail, rather, enumerate the types of work you were to do?

A. Yes. [142]

Mr. Johnson: I believe I want to object to that as a conclusion. He is well able to state what he did.

The Court: The answer may stand.

Q. (By Mr. Landye): I am not quite clear about this guardhouse. How large a room was that?

A. I really don't know what the actual dimensions was in feet, but I would say it would be about, over-all, about 30 by 30.

Q. How many guards would they put in the place at one time?

A. Well, they couldn't get them all in there in the squad room at one time. On my particular shift we had at one time 117 men, and we could not get all these men in the squad room—that is where we

(Testimony of Collyer T. Potter.)

called the roll—so some of them were lined up on the outside. There just wasn't room enough for them all to get into the squad room.

Q. Now, when you were a lieutenant and the men had lined up for roll call—— A. Yes.

Q. ——at 4:00 o'clock, or a half hour before you went to your regular posts, did you give them orders at that time or did the captain give orders at that time to the men?

A. Well, presumably a lieutenant was responsible for the activities on that particular shift, and it was his business to issue orders, of course, under general instruction of the Chief.

Q. Let us take it the other way around. When you were a guard, before you were a lieutenant,—better take it the other way [143] around—between 4:00 and 4:30, before you actually got to your post, were you given orders by the various people over you, before you actually went on post, between 4:00 and 4:30?

A. No, I wouldn't say that I was given orders at that particular time.

Q. You had roll call?

A. Had roll call and then after roll call orders were given.

Q. That is what I mean. That would be between 4:00 and 4:30? A. That is right, yes.

Q. What did they do? When you say they had inspection, did they actually have inspection?

A. We tried to see to it if their uniforms were clean and that they were properly cleaned up gen-

(Testimony of Collyer T. Potter.)

erally, not come down with a crop of whiskers—to see that they were presentable.

Q. The senior officer or lieutenant or sergeant would be inspecting? A. That is right.

Q. Would he line you up?

A. Yes, line up. You line up for roll call.

Q. Then what did the officer do? Did he call out your names? A. Call out the names, yes.

Q. Find out if you were present?

A. That is right.

Q. Then, would he go down the line and look over the uniforms?

A. He might not have done that all the time. He could probably [144] give them all a going-over without taking each individual man. If they were not presentable, it would show up, some way or other if he got on his toes. It was a pretty hard matter, when they were as thick as they were in that squad room, to go around among them and see just exactly how they were dressed.

Q. It was at that point, between 4:00 and 4:30, when assignments were made to various posts?

A. That is right.

Q. Who made those assignments?

A. The sergeant, under direction of the lieutenant.

Q. What did he do? Tell the various people to go to various posts? A. That is right.

Q. Then, what happened after that?

A. Well, they would do whatever they were instructed to do on that particular post. Each post

(Testimony of Collyer T. Potter.)

did not just exactly have the same set of orders. There were different things to be done.

Q. All the time you really are claiming for—that is before you became a lieutenant—you performed all that work right in the main shipyard, is that correct?

A. Before I became a lieutenant? Yes, that is right.

Q. That was all in the main shipyard?

A. That is right.

Q. Around the ships? A. Yes. [145]

The Court: What was the distance from the guardhouse?

Q. (By Mr. Landye): What would be the distance from the guard house to the various posts that the men had to go to?

A. Well, there was one post immediately outside of the guardhouse. All around down to the outfitting basin, clear around the yard.

The Court: A mile?

A. Yes, I would say a mile all the way around.

Q. (By Mr. Landye): In other words, the posts would vary from a hundred feet or so to a mile?

A. A mile might be stretching it a little bit.

The Court: Out in the weather? It was outside?

A. Oh, yes, all outside.

Q. (By Mr. Landye): If you would come in at 4:00 o'clock, you would get off, I suppose, at 12:00. After you completed your shift, how long would it take to make out these reports?

A. Well, I would say on an average——



(Testimony of Collyer T. Potter.)

Mr. Johnson: I want to object to that question on the ground it is incompetent, irrelevant and immaterial. Mr. Landye has stated that the claims are confined to a half hour before the shift.

Mr. Landye: That is right. Is this Mr. Potter's record? We did not go into it, but I would like the record to show that he went to work there May 2, 1942, at a rate of 87 cents an hour; and then on 8/9— [146]

Mr. Johnson: August 9th.

Mr. Landye: August 9, 1942, he was raised to \$1.03 an hour. On January 3, 1943, \$1.10 an hour.

Mr. Johnson: As guard sergeant.

Mr. Landye: Then, on February 28, 1943, he became a guard lieutenant at so much a week, I think it was, and his claim cuts off there.

Mr. Johnson: His claim runs from May 2, 1942, to February 28, 1943, when he became a lieutenant?

Mr. Landye: That is correct. That is all.

### Cross-Examination

By Mr. Johnson:

Q. In the period, Mr. Potter, from May 2, 1942, to February 28, 1943, while you worked as a guard or a guard sergeant on an hourly basis, how often were you paid your wages by the defendant Kaiser Company, Inc.? A. Once a week.

Q. You were paid regularly week by week, is that correct? A. That is right.

Q. I take it, then, in this period of some eight or ten months—some nine or ten months—you re-



(Testimony of Collyer T. Potter.)

ceived a pay check regularly, week after week, from the defendant, is that right? A. That is right.

Q. You accepted and cashed each of those checks and received the money represented thereby? [147]

A. Yes.

Q. During that period, May 2, 1942, to February 28, 1943, you worked on an hourly wage rate, didn't you? A. That is right.

Q. And you knew, did you not, that in computing the amount due you in these weekly checks you were getting, you were being paid for eight hours a day?

A. That is right.

Q. You knew, did you not, that if you worked a work week of six 8-hour shifts that you would be paid at the hourly rate applicable to your case for forty hours at straight time and for eight hours at time and a half, is that right?

A. That is right.

Q. You knew during this period, did you not, that Kaiser Company, Inc., was not including in the time it was paying you for this half hour you have told us about that you were required to report in advance? A. Yes.

Q. In advance of your arrival at your post of duty?

Mr. Landye: Object to the question, your Honor. It is immaterial whether he did know it or whether he did not know it. There isn't any such a thing as accord and satisfaction in a wage and hour case. Even if he did know it, it didn't make any difference. It didn't make any difference whether he knew it or whether he didn't. [148]

(Testimony of Collyer T. Potter.)

Mr. Johnson: If your Honor please, I am not directing my line of inquiry to that point at all. My line of inquiry is directed to the question as to whether or not the amount now being sued for here was in full payment within the meaning of the Portal-to-Portal Act. The question as to what the plaintiff knew about it is highly material, your Honor, in deciding the question of jurisdiction under the Portal-to-Portal Act.

Mr. Landye: I claim the Portal-to-Portal Act is unconstitutional.

Mr. Johnson: I assume we will get to that in due time, but we can only go one step at a time.

Mr. Landye: It is your step, not mine.

Q. (By Mr. Johnson): You knew when you received these weekly pay checks that Kaiser Company, Inc., was not including in the time basis on which it paid you the amount due the half hour period that you say you were required to report to the guardhouse in advance of your going on your post duty, isn't that right? A. That is right.

Q. When did you first make demand on Kaiser Company, Inc., that it pay you for that half hour that you say you spent at the guardhouse before you went to your post of duty?

A. I don't remember what the dates are there; the time we instituted this lawsuit, whatever date that is.

Mr. Landye: I think it is the first part of January, 1946.

(Testimony of Collyer T. Potter.)

Q. (By Mr. Johnson): If I were to tell you, Mr. Potter, that this [149] lawsuit that we are now trying was instituted by the filing of a complaint with the Clerk of this Court on January 17, 1946, would you say that is the first date on which you made demand on Kaiser Company, Inc., for this amount? A. I would say that is about correct.

Q. As a matter of fact, it was considerably after March 4, 1945, the date on which your employment at the Swan Island Yard ceased, isn't that right?

A. That is right.

Mr. Landye: Can't we agree that, long prior to the filing of the suit, in a conversation between your office and my office concerning this case, you were informed Mr. Potter complained to me some months before that? And can't we agree we did not file the suit for three or four months after our conversation?

Mr. Johnson: Let us put it this way——

Mr. Landye: I mean, to be fair with the witness.

Mr. Johnson: The discussion between you and me did not commence until some three or four months before the suit was filed.

Mr. Landye: That is true.

Mr. Johnson: Which would be some time previous.

Mr. Landye: Oh, yes.

Q. (By Mr. Johnson): As I understand the amended complaint in this case, you are the assignee of all of the plaintiffs named on Exhibit A of the amended complaint, is that right? [150]

A. That is right.

(Testimony of Collyer T. Potter.)

Q. When did you start taking assignments from the plaintiffs in this case?

A. I really don't remember the exact date. It was some time about the time we started the suit there.

Q. Then it was some time after your employment at the yard ceased, wasn't it? A. Oh, yes.

Q. Isn't it a fact, Mr. Potter, that you started activities—let me put it this way: Isn't it a fact that you first got the idea that you were entitled to be paid for this half hour a day reporting time when you heard, some time after your employment ceased on March 4, 1945, that a court somewhere had decided that under the Fair Labor Standards Act this reporting time had to be included in the computation of work time?

A. Well, there were rumblings of that even before I left there in the guard department, but I never paid no particular attention to it until some time after I had left and a great number of the guards asked me what I knew about it.

Q. Fix that time, if you will, please, when you first heard these rumblings that you were entitled to be paid for this reporting time?

A. Well, I should say——

Q. With respect to the date on which your services terminated, March 4, 1945? [151]

A. I would say at some time along in December, 1944.

Q. December of 1944? A. Yes.

(Testimony of Collyer T. Potter.)

Q. Is it not a fact that about that time you heard, somewhere along the line, that a court down in Los Angeles had determined the guards employed by the Consolidated Steel Company of Los Angeles were entitled to pay for their reporting time?

A. No, it is not. I never heard that.

Q. Did you ever hear of that case?

A. Never heard of it.

Q. What did you hear about this matter?

Mr. Landeye: Just a minute. What difference does it make where he heard it? He heard it somewhere along the line, apparently, but what difference does it make how he heard about it? Not that we have any particular objection, but why prolong this case?

Mr. Johnson: I submit, your Honor, if Mr. Landye claims that this is one of the cases which is not covered by the Portal-to-Portal Act, I am entitled to go into the question, in the light of the findings and the policy set out in Section 1 of the Portal-to-Portal Act with respect to windfall payments and an industry being liable for payments which employees theretofore had not expected to receive. I think I am entitled to develop the facts to show that this case falls identically and explicitly within the findings of Congress, as a result of which they passed this [152] Act.

Mr. Landye: What difference does it make? The rumblings started in Kaiser Company along about March 3rd, I believe, or the first part of 1945, some-

(Testimony of Collyer T. Potter.)

where during that time, that the Kaiser Company people got a report or heard rumblings about reporting time.

Mr. Johnson: That is not his testimony. He says——

Mr. Landye: You are the one who started it.

Mr. Johnson: He said he heard about in December, 1944.

The Court: We won't be able to finish tonight. I would like you to be here at 9:30 in the morning.

(Adjournment at 4:55 o'clock p.m.) [153]

Court reconvened at 9:30 o'clock A.M.,  
June 26, 1947

### COLLYER T. POTTER

plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

#### Cross-Examination (Continued)

By Mr. Johnson:

Q. Mr. Potter, when you entered the employ of Kaiser Company, Inc., at its Swan Island Yard, as a guard, on May 2, 1942, did you sign a contract, a written contract of employment? A. No.

Q. When you entered the employ of Kaiser Company, Inc., as a guard on May 2, 1942, did any representative of the defendant tell you that you would be paid for the time that you spent in reporting prior to going on your shift? A. No.



(Testimony of Collyer T. Potter.)

Q. As a matter of fact, no representative of the defendant ever told you that, isn't that correct?

A. That is right.

Q. And it is true, is it not, that at no time during your period of employment from May 2, 1942, through February, 1943, did you ever have a written contract of employment? A. No.

Q. It is true, is it not, that, as far as you know, from May 2, 1942, to March 1, 1945, Kaiser Company, Inc., never paid any [154] guard employed by it for the time required to report in advance of going to post of duty? A. That is right.

Mr. Landye: What is that last date, March 1, 1945?

Mr. Johnson: Yes.

Q. In other words, no such payment was ever made? A. No.

Q. I take it, then, so far as you are aware, in the period from May 2, 1942, to March 1, 1945, there was never in effect at the Swan Island Yard of Kaiser Company, Inc., any custom or practice under which this reporting time was paid for?

A. Not that I know of, no. I don't believe so.

Q. So far as you are aware, you had no written or non-written contract with Kaiser Company, Inc., under the terms of which such time was to be considered in computing wages? A. That is right.

Q. You had no such contract?

A. I had no such contract.

Q. As I understand it, Mr. Potter, you are the assignee of all of the guards who are suing for back wages in this case? A. Yes, sir.



(Testimony of Collyer T. Potter.)

Q. It is correct, is it not, that you did not start obtaining those assignments of claims until after your employment terminated on March 4, 1945.

A. That is right. [155]

Q. About when did you start obtaining the assignment?

Mr. Landye: Objected to, whether he went around—well, why don't you tell him how you happened to obtain them?

Q. (By Mr. Johnson): How did it happen you started obtaining assignments of claims for additional compensation under the Fair Labor Standards Act against Kaiser Company, Inc., Swan Island Yard?

A. A number of men came to my office and asked me what I knew about this, about this claim for overtime.

Q. Yes.

A. And, as a matter of fact, I didn't know very much about it. I didn't pay very much attention to that but so many kept coming in that I investigated and found that it was a legitimate claim under the Fair Labor Standards Act.

Q. Now, you say you investigated. Tell us what you did.

A. I went to the Bureau and got a copy of the law.

Q. Pardon me?

A. I went to the Bureau of the—the Fair Labor Standards Act Bureau.

(Testimony of Collyer T. Potter.)

Q. You mean the Wage and Hour Division of the Department of Labor? A. That is right.

Q. Whom did you see there?

A. I don't remember his name. I saw the man in charge there. I don't remember his name. [156]

Q. Did he tell you that in his opinion, because of certain decisions of the courts he thought you had a claim against the defendant? A. He did.

Q. Did he ask you whether or not you had ever made a demand on the company to pay you the wages, while you were working for it? A. No.

Q. Did he ask you whether the company had ever agreed to pay you such wages? A. No.

Q. He just told you he thought you had a claim, is that right? A. That is right.

Q. About when did that happen, Mr. Potter?

A. Well, I would say that was three or four months after the termination of my employment.

Q. That would be around June or July, 1945.

A. I should say around there.

Q. What did you do after you got this advice from this Government official that he thought you had a claim?

A. I talked with the men as they came in, for some little time, about it, and they importuned me to take some action for them.

Q. You told them of this conversation you had with this Government official?

A. That is right. I told them of this conversation I had, so then I began to take their names and addresses and I contacted [157] the firm of Green & Landye to represent us.

(Testimony of Collyer T. Potter.)

Q. I take it at that time you decided you would all get together and file a lawsuit?

A. That is right.

Q. And see if you would get the money, is that right? A. That is right.

Q. Did you know the various persons who are named as plaintiffs with you in this case while you were working as a sergeant—withdraw that—as a lieutenant at the Swan Island Yard?

A. Yes, I know personally nearly all of them.

Q. I take it you never told any of them that the company would pay them for this reporting time—I mean, while you were working as a lieutenant for that company, you never told any of these plaintiffs that they would be paid for reporting time, did you?

A. No, I didn't.

Q. As far as you know, they were never paid for that time, were they? A. That is right.

Mr. Landye: Why go over that? That is why we are suing here. We agree we were not paid for that half hour. That is why we are here in this court now.

Mr. Johnson: I am simply trying to establish facts with reference to the jurisdictional question. I take it, Mr. Landye, that there is no claim by the plaintiffs that at any time during [158] their employment at the Swan Island Yard of Kaiser Company, Inc., was there in effect a written or non-written contract, under the terms or express provisions of which reporting time was compensable?

Mr. Landye: I will put it this way: That approximately to March 3, 1945, these men were

(Testimony of Collyer T. Potter.)

required to report for work, according to their instructions, a half hour before they actually went to their posts, for roll call, inspection, and that type of thing; and that, if they did not show up, as was testified to on the stand, for that half hour they were discharged, if they did not get there a half hour earlier; and that after, roughly, March 3, 1945, Kaiser Company, Inc., then eliminated the roll call and eliminated the half hour and so they, at that time, only appeared at 4:30 at their posts.

We will stipulate that none of the men have ever been paid for that half hour and that is the reason we are in court now. Certainly we do not claim we were paid for it. We wouldn't be here otherwise.

The Court: He wanted to know if you had a written or unwritten contract.

Mr. Landye: I want to ask the witness one question. Maybe I can straighten it out in my own mind.

Q. There was no union down there, was there?

A. No.

Q. The guards were not organized? [159]

A. The guards were not organized.

Mr. Landye: No. We will say that there was no written contract or oral contract that I can prove, at least, that this half hour was to be compensated for.

Mr. Johnson: I take it, too, from your statement, since you say none of them were paid at any time, that there was no custom or practice at the Swan Island Yard under which the time was compensable?

(Testimony of Collyer T. Potter.)

Mr. Landye: Unless I can take custom and practice retroactively. After March 3, 1945, they discontinued the practice.

Mr. Johnson: If they did not have any reporting time, they could not have paid for it then?

Mr. Landye: No. I do not want to clutter up the record with things I can't prove. That is the fact, though.

Mr. Johnson: That is all of the examination I have of this witness at this time, your Honor. If we go to the merits, I would like to reserve the right to recall him for further examination.

#### Redirect Examination

By Mr. Landye:

Q. Just to clear up one thing: You have never been paid for this half hour time that you reported for roll call and until you actually got to your post?

A. Never.

Q. How much time did you spend altogether, from the time you [160] were at your actual post until you were relieved again? Was that eight hours?

A. Eight hours.

Q. So, including this half hour, then, it would be eight and a half hours, is that correct?

A. Yes, at least eight and a half hours.

Q. At least eight and a half hours?

A. Yes.

Q. Then you worked six days a week, is that correct?

A. Yes.

(Testimony of Collyer T. Potter.)

Q. Were you paid overtime for that sixth day, do you remember?

A. Yes, I think we had some overtime arrangement after forty hours.

Mr. Landye: I guess that is all.

Recross-Examination

By Mr. Johnson:

Q. Just one question, Mr. Potter: In other words, in your employment as a guard at the Swan Island Yard, you were paid time and a half for hours in excess of forty per week, as those hours were computed and recorded by the defendant, Kaiser Company, Inc., isn't that correct?

A. That is right.

Q. Your claim here is that, in computing those hours and determining the time in each week that you worked, they did not include this reporting time, isn't that correct? [161]

A. That is right.

Mr. Johnson: That is all.

(Witness excused.)

Mr. Landye: I think I can enter into a stipulation with Mr. Johnson that the other plaintiffs, Mr. Farrell, Mr. Kolmer, Mr. Curveon and Mr. Cozad, if called as witnesses in this case, would testify the same as Mr. Potter did, to the same state of facts, and would have answered the questions on cross-examination, in so far as they were pertinent to their particular matter, in the same manner, and



that would include, also, I understand, Mr. Johnson, Exhibit 31, that they were given a copy of the General Instructions.

Mr. Johnson: For the purpose of this issue of jurisdiction under the Portal-to-Portal Act, I am willing to enter into that stipulation.

Mr. Landye: And, just for the purpose of the record, just to complete it, I can stipulate with you that Mr. John Farrell went to work February 13, 1943, at a rate of 95 cents a hour, and that on March 21, 1943, he was raised to \$1.03, and that on 10/3—that would be October 3, 1943—he was raised to \$1.05, and that on March 3, 1944, he was raised to \$1.15. I don't understand this. It shows "Guard" but seems to have dropped down to \$1.05.

Mr. Johnson: That applies to the preceding line.

Mr. Landye: Yes. Then, September 17, 1945, he went to \$1.05.

Mr. Johnson: March 4, 1946, he was raised to \$1.23. That is this year; 1946, rather. I think he is still working for them.

Mr. Landye: Wait a minute. He is down there working today. That is why he is not in court.

The Court: Mr. Whitaker has a suggestion to make to you, Mr. Landye.

Mr. Landye: The man is still working. Kolmer went to work May 7, 1942, at 87 cents an hour; June 15, 1942, 95 cents an hour; January 3, 1943, \$1.03 an hour; April 4, 1943, \$1.10; October 3, 1943, \$1.20; terminated August 31, 1945.



Charles Cozad went to work June 6, 1942, at 87 cents an hour; January 3, 1943, \$1.03; February 4, \$1.10; October 4, 1943, \$1.20; March 4, 1946, guard sergeant, \$1.38; and left on March 7, 1946.

James Curveon went to work on July 3, 1942, at a rate of \$1.01; July 4, 1942—strike that out.

The first employment he had was not as a guard. It was as an oiler for one day, July 4, 1942. February 21, 1943, he started as a guard, 95 cents; February 21, 1943, \$1.03; October 3, 1943, he was getting \$1.05, and left his employment on 9/16—that would be September 16, 1945.

Mr. Johnson: Those dates and rates are correct.

Mr. Landye: That is all, your Honor.

Mr. Johnson: I have nothing to offer on this particular aspect of the case in the light of the testimony of Mr. Potter and the stipulation with respect to the testimony of the other witnesses. If that concludes the plaintiff's showing on jurisdiction under the Portal-to-Portal Act, I would like to be heard on the issues.

Mr. Landye: Yes.

The Court: I suggest, to point the matter up, I will now entertain a motion to dismiss for want of jurisdiction under the Portal-to-Portal Act of 1947.

## DEFENDANT'S MOTION FOR DISMISSAL

Mr. Johnson: If your Honor please, at this time, in view of the showing adduced by the plaintiffs, with respect to the nature of the claims here involved, and in the light of the provisions of the recent enactment of Congress known as the Portal-to-Portal Act of 1947, I wish at this time to move to dismiss the pending action now before the Court on the grounds (1) that, under the provisions of Section 2(a) of the Portal-to-Portal Act, no showing has been made warranting the imposition of liability against the defendant under the terms of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act; and (2) on the ground that, under the provisions of Section 2(d) of the Portal-to-Portal Act, the Court has been deprived of [164] jurisdiction over this action, for the reason that the testimony of the plaintiffs establishes that the case does not fall within the two situations mentioned in Section 2(a), subdivision (1) and (2), under which liability for claims existing prior to May 14, 1947, the effective date of the Portal-to-Portal Act remain, and the jurisdiction of the Court to enforce such claim remains.

On these grounds I move that the matter be dismissed and that no further proceedings be had by this Court, for the reason that the Court, under the recent enactment of Congress, is without jurisdiction over the proceedings. [165]

\* \* \* \* \*

The Court: Tinkering with jurisdiction to accomplish a substantive purpose is a very dangerous thing, and some day the lawyers of this country will wake up to that danger and will throw their weight against it. The people who conceived the idea and turned it loose on the American people have no reason to be proud of their creation, in my opinion. This has been going on for some time.

In addition to the Acts previously referred to, now [185] we have got the Renegotiation Acts where it is provided that a man can be sued but cannot defend. Somebody, sometime, is going to condemn that idea that courts can be used to hit somebody whose hands are tied in advance and he cannot defend. The same idea was in the OPA legislation and elsewhere.

But, regardless of how I feel about it, it is my duty to follow authority, and authority in this country has upheld prior legislation where the same principle is involved and, therefore, compels me to sustain the motion to dismiss, and that will be the order, with exception to the plaintiffs.

Mr. Landye: May I ask the Court that the actual signing of the order be held up until my reply gets in?

The Court: That is understood. [186]

[Title of District Court and Cause.]

### REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 24th, 25th and 26th days of June, A. D. 1947, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 186, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates as aforesaid, and of the whole thereof.

Dated this 15th day of December, A. D. 1947.

/s/ IRA G. HOLCOMB,  
Court Reporter.

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[Endorsed]: No. 11889. United States Circuit Court of Appeals for the Ninth Circuit. C. T. Potter, et al., appellants, vs. Kaiser Company, Inc., a corporation, and United States of America, appellees. Transcript of Record Upon Appeal from the District Court of the United States for the District of Oregon.

Filed April 2, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the Circuit Court of Appeals of the United States  
for the Ninth Circuit

No. 11889

C. T. POTTER, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC., a corporation,

Defendant,

THE UNITED STATES OF AMERICA,

Intervenor.

STATEMENT OF POINTS UPON WHICH  
PLAINTIFFS - APPELLANT INTEND TO  
RELY ON APPEAL

Now come the plaintiffs-appellant and each of them and hereby adopt the statement of points upon which the plaintiffs-appellant intend to rely on appeal that was filed in the District Court of the United States for the District of Oregon as the points upon which they intend to rely for appeal in this Circuit Court of Appeals of the United States.

Dated this 5th day of April, 1948.

GREEN, LANDYE &  
PETERSON,

By /s/ JAMES LANDYE,

Attorneys for Plaintiffs-  
Appellant.

Due service of the within Statement of Points is hereby accepted in Multnomah County, Oregon, this 5th day of April, 1948, by receiving a copy thereof duly certified as such by James Landye of attorneys for plaintiff.

/s/ RICHARD DEVERS,  
Of Attorneys for Defendant,  
UNITED STATES OF  
AMERICA,

By /s/ EDWARD B. TWINING,  
Assistant U. S. Attorney.

[Endorsed]: Filed April 7, 1948.